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CHARLES ELMORE

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

ALANDA NEMOURS,

Petitioner,

vs.

J. F. HICKEY, T. J. HARGADON and
GUS M. BISTON, Individually and as
AGENTS OF MOORLANDS
ADDITION,

Respondents.

} No. 139.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Missouri

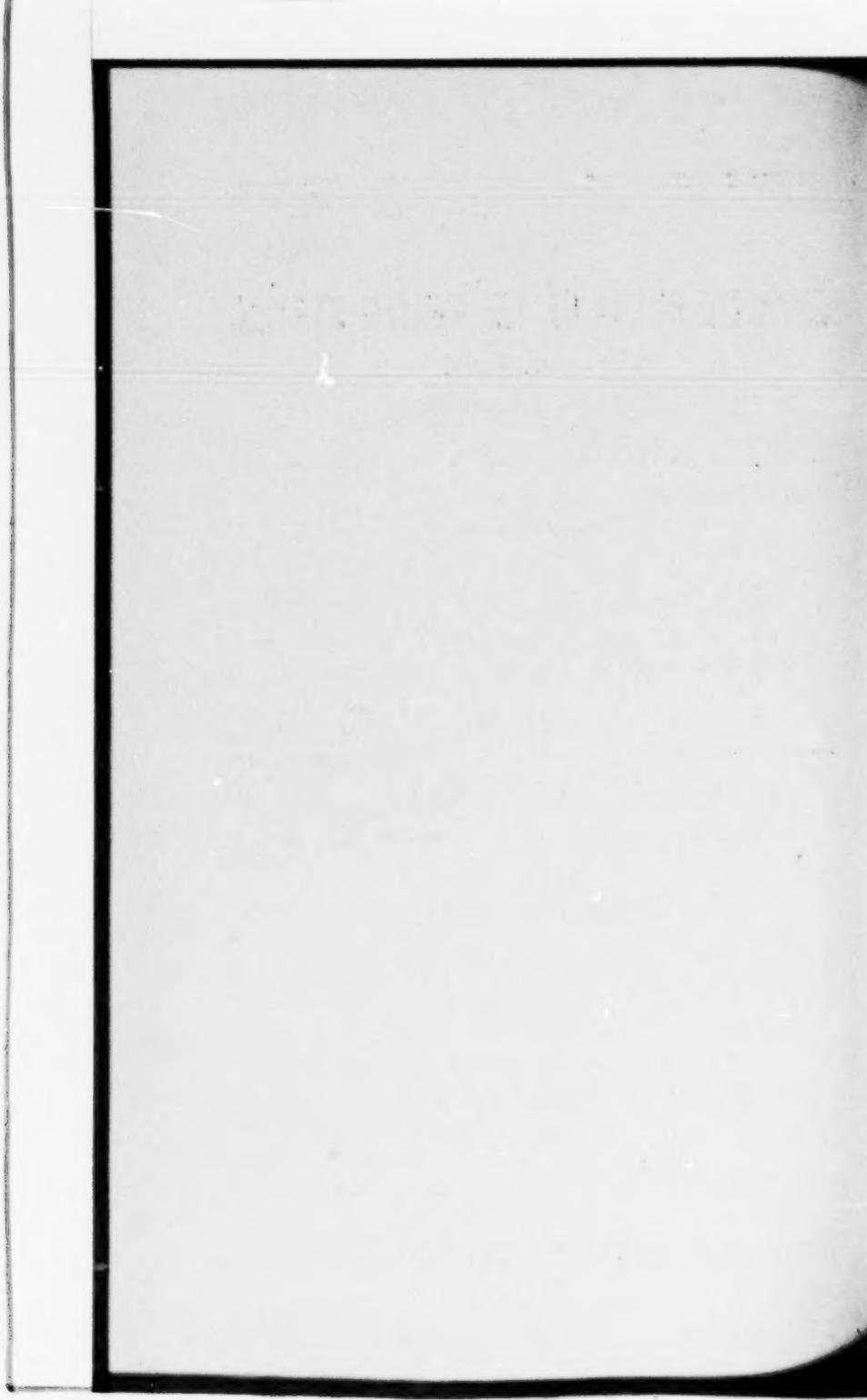
and

SUPPORTING BRIEF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court Of The State Of Missouri.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, and to the Associate Justices:

Your petitioner, Alanda Nemours, an individual, respectfully shows to this Honorable Court:

I.

STATEMENT OF MATTER INVOLVED.

This is an equity suit involving the constitutional question as to whether or not private property of petitioner has been taken for public use without just compensation. The petitioner sought to obtain an injunction in said suit against certain "Agents" to restrain them from using and allowing to be used, as a public street and public thoroughfare, Glen Ridge Avenue, a private street maintained by

petitioner and other property owners, in the City of Clayton, Missouri. The trial court denied the relief sought by petitioner (R. 314-316). Thereupon, an appeal was taken to the Supreme Court of Missouri and on September 8, 1947, Division 2 of said Supreme Court rendered its Divisional Opinion (R. 325-336) reversing the judgment of said trial court. Upon Respondents' Motion for Rehearing and to Transfer to the Court en Banc, the same was sustained and the Divisional Opinion was disregarded. Thereafter, the Court en Banc sustained the trial court (R. 338-345). Your petitioner is seeking a review from the decision of the Supreme Court of the State of Missouri en Banc.

Your petitioner feels that the facts as stated in the Divisional Opinion of the Supreme Court of Missouri are full and fair, and the following statement of fact is largely as set out in the Divisional Opinion (R. 325-336). Petitioner will have occasion to point out to this Court that the law, as announced in the Divisional Opinion, is the correct rule of law as announced by the Supreme Court of the United States, by the Supreme Court of Missouri, and by other courts, and this Court will observe that the opinion of the Supreme Court of Missouri en banc cites no authorities to support its said decision. The en banc decision is diametrically opposed to the Divisional decision, the Court en banc holding that no legal right of petitioner has been violated, and holding that her property, consisting of an easement in a private street, in a private subdivision, towards the maintenance of which she contributes, was not destroyed, and the said en banc decision is opposed to the applicable Federal Constitutional provisions and decisions of this Court, as will be pointed out hereinafter.

Your petitioner, Alanda Nemours, owns the property at the northeast corner of Glen Ridge Avenue and Clayton

Road in Moorlands Addition, a restricted residential Sub-division in the City of Clayton, Missouri (R. 80). She instituted this action against J. F. Hickey, T. J. Hargadon and Gus M. Biston, Individually and as Agents of Moorlands Addition, seeking among other relief an injunction to enjoin and restrain the Agents from violating the terms, provisions and conditions of a certain Trust Indenture containing covenants which controlled the operation and maintenance of the private subdivision, and particularly from continuing to keep Glen Ridge Avenue open to the public and to nullify and declare void a certain "Easement" granted by the said Agents under date of Dec. 2, 1939 to the City of Clayton. Under the said easement the Agents made a perpetual grant to the City of Clayton of a strip of Glen Ridge Avenue in front of petitioner's home (R. 70). She claimed the acts of respondents caused her damages of \$9500.00, of which at least \$6000.00 was damages to her property and \$3500.00 was expenses (R. 16). The respondents are the duly elected agents of the lot owners, elected for the purpose of carrying out the restrictions and covenants applicable to the private subdivision, known as "Moorlands Addition." Moorlands Addition is bounded by Wydown Boulevard, Audubon Drive, Clayton Road and Westwood Drive on the North, East, South and West, respectively (R. 100). Glen Ridge Avenue is a privately owned North and South street, twenty-six feet in width, running from Clayton Road to Wydown Boulevard and entirely within said subdivision (R. 101). It is open to the public use except for a week or two each year (R. 88, 105). Respondents have permitted its use so extensively by the public as to constitute it a public street so far as user is concerned and, so long as such user continues, subject to traffic regulations under the police power of the said municipality of Clayton (R. 106).

City of Clayton v. Nemours, 353 Mo. 61, 182 S. W.
2d 57.

They have in fact induced and invited its use by the public as a public thoroughfare between Wydown Boulevard and Clayton Road (R. 108).

The trial in the lower court resulted in a decree setting aside the easement of December 2, 1939, executed by the respondents (Exhibit E, R. 69-71), which easement purported to authorize the City of Clayton to install, maintain, and perpetually operate certain traffic regulating devices upon the south 60 feet of Glen Ridge Avenue (R. 314-316) (immediately in front of petitioner's home), but other prayers of petition for relief were denied. Petitioner appealed and contended that the acts of respondents contravened constitutional provisions protecting her private property rights. In fact, petitioner raised the violation of her Federal constitutional rights at the outset of her case (R. 18).

Originally, the then owner of Moorlands Addition caused the said land to be platted and subdivided into blocks and lots with private streets et cetera and the plat to be recorded (R. 21). On December 11, 1922, in contemplation of large expenditures of money for the stated purposes of improving said land and making and maintaining the lots thereon "for residence purposes and to render them desirable therefor and * * * to secure to the purchasers of lots therein, and to their heirs and assigns, the exclusive use and enjoyment of said streets" et cetera, the owner conveyed and vested the title to all the streets and park shown on said plat in three named trustees, and their survivors and successors, "as joint tenants and not as tenants in common," in trust until the death of the last survivor of said originally named trustees and subject to the covenants in said indenture set forth. The plat, made a part of said indenture by reference, stated that the streets thereon shown "are private places laid out for the

exclusive use and benefit of owners of lots in the above mentioned subdivision for the purpose of building and maintaining roads * * * et cetera (R. 39).

The trustees had broad powers and duties within the provisions of the indenture. They were to keep the private streets in good condition and free from obstructions, and, if necessary, to reconstruct and improve the same, and "protect and preserve said tract of land from encroachment, trespass, nuisance and injury, so as to carry out the true intent and meaning of this deed * * *" (R. 44). The expenses were to be assessed against the lots and the owners as provided in said Trust Indenture (R. 46). The indenture was to be binding upon the lots in said subdivision and the owners thereof, the covenants running with each of said lots and against any lot owner, who might sue any person or persons violating any covenant of said indenture in law or equity (R. 53).

All owners of residence lots therein and their families were to "have free access to said private * * * streets" and the right to use the same as places of passage; "subject, however, to such reasonable rules and regulations as the trustees and the said lot owners themselves as herein-before provided, may from time to time, make and prescribe," said right of access and passage being made an "easement" for the benefit of each said lot and passing as appurtenant to each of said lots (R. 45-46).

The trustees could "dedicate for public use the said private * * * streets" when so authorized and directed by a majority of all the then lot owners. If the land be taken into the limits of a city, the trustees had power to convey the streets et cetera to the city, "provided the trustees first obtain written consent of the owners of three-fourths of the number of front feet in said tracts." "If, at a

meeting of the owners of said residence lots" held after **January, 1962**, "a majority of all of said lot owners shall determine * * * that all or any of the trusts, restrictions, conditions, covenants and reservations hereinabove expressed shall be abolished, annulled and cancelled," they were vested with authority so to do (R. 58).

The trust estate was made to cease and fully determine upon the death of the last survivor of the three originally named trustees (R. 55), and "the legal title to the private * * * streets * * * shall vest in and hereby is conveyed to all of the then owners of said lots," their heirs and assigns, "as tenants in common, but subject to the easements, conditions, restrictions, covenants and charges" in said indenture set forth, which were continued in full force as **easements, conditions, restrictions, covenants** and charges (and not as trusts) running with and appurtenant to the said several lots (R. 55); and power was given to the owners "of the said residence lots or the major part of said lots, to carry out, continue and perpetuate in respect of said private * * * streets * * * the general object and intents of said trusts and improvements in the manner following; that is to say, they, or the owners of a majority of said lots, shall by vote or other agreement adopt such reasonable rules and regulations as they may think proper affecting said private * * * streets * * *, provided such rules and regulations shall be consistent with the easement and right to frequent, use and enjoy the said private * * * streets * * *, as hereinbefore in this deed created and granted for the benefit of the person who may from time to time be owner of any of the residence lots abutting thereon, and also consistent with the general objects and intents of said trust previously existing and tending to promote the improvements thereto before made and hereinabove in this deed provided for * * *" (R. 56). The indenture provided for the ap-

pointment of "agents" by the lot owners or a majority of them to continue the administration of the provisions of the indenture (R. 57).

The last survivor of the originally named trustees having died (R. 66), a majority of the owners of the lots met on December 28, 1933, and appointed "agents" to manage and control said subdivision "as the agents of the owners of all the lots in said subdivision and no longer as trustees under said indenture." The original indenture, as amended, was made "the basis for the control and management of said Moorlands Addition by our said agents," which they were to enforce as agents (R. 65-69). They had no greater authority than their predecessor trustees. The instrument prepared by the owners at this meeting further provided that in case said Agents " * * * shall attempt to do any act * * * which said trustees were not authorized to do or to make under said indenture, the same shall be absolutely null and void * * *" (R. 69).

Traffic on Glen Ridge Avenue became so heavy the City of Clayton regulated it under ordinances passed in the exercise of its police power (R. 73-79). Markers were painted upon the surface for three lanes of traffic and electric automatic stop and go signals were installed on Glen Ridge Avenue to permit of passage therefrom onto Clayton Road, and parking on both sides of Glen Ridge was prohibited for a distance of 115 feet north of Clayton Road (R. 83). Prior thereto, however, the City sought and obtained on December 2, 1939, from the aforesaid "agents" of the lot owners, the said writing which purportedly granted the City an easement to install, maintain and operate the traffic signals aforesaid (R. 69-71).

The petitioner lives in the said corner house with her son. Across the street is a vacant lot.

The trial Court held (R. 314-316): That the "easement" of December 2, 1939, was null and void. That the lot owners, or a majority of them, had power to make reasonable rules and regulations, consistent with the right of user in the lot owners and their families, to prevent or restrict the use of said street by the public. That the right of the City of Clayton to regulate the traffic on Glen Ridge Avenue stands adjudicated, and said right continues until such time as the lot owners make and enforce reasonable rules and regulations effectively preventing the public user of said street. That the court would not remove the "agents." That an injunction should not issue against the agents because the Court of Appeals held the street was being used by the public with the permission of the lot owners, who by reasonable rules and regulations, might provide for the restoration of the street as a private street. That the court was without authority to appoint other agents or order an election therefor. That it stands adjudicated that the use of the street as a public street has been with the consent and permission of the lot owners, and no damages have been shown by virtue of the conveyance of the easement. That plaintiff (petitioner) had not been deprived of her property without due process of law by the "agents" inasmuch as the previous decisions held that the public user of the street was permitted by the lot owners and such user occasioned the municipal regulation of traffic thereover.

The said Divisional Opinion found that the trial court based its ruling upon the language used by the St. Louis Court of Appeals in the case of *Nemours v. City of Clayton*, 237 Mo. App. 497, 504, 510, 175 S. W. 2d 60, 62, 65 (3, 4), in reaching its decision that Glen Ridge Avenue had become a public street as to user by sufferance of its owners, who retained the power to revoke this license of user (R. 326); but so long as such user was permitted, the City

could require the observance of reasonable regulation of traffic thereover by all, the said St. Louis Court of Appeals having stated, "The owners may of course exclude the public from it at any time they wish, and if such right of revocation is ever exercised, the City's power and duty to regulate will automatically terminate, and any ordinance to that end becomes at once inoperative by reason of the removal of the sole basis upon which it depends for its validity" (R. 331).

Division No. 2 of the Supreme Court of Missouri agreed with these observations and held that a majority of the lot owners could make rules continuing the status of the "private streets" as private streets, but their authority is circumscribed by the covenants of said indenture (R. 331); and further held that the lot owners could exclude the public and restore the private character of said streets at any time because such action conforms with the covenants of the Indenture, but, since the death of the last survivor of the original trustees, the legal title to the fee of said private streets had been vested in the lot owners as tenants in common, subject only to the lot owners' exclusive right of passage over said private street (R. 331).

Division No. 2 of the Supreme Court of Missouri further held that the fee thus vested had not at any time been affected or debased by any authorized action permitting the user of the private streets by the general public or any authorized action depriving any such tenant in common of his proper occupancy under his ownership of the fee of the private street (R. 331). It was admitted that there had been no dedication of the private streets to public user within the powers conferred by the indenture or any acquisition of the private streets by the public by purchase, prescripton or condemnation proceedings (R. 331). The spirit and the letter of the indenture, as fully

effective now as originally, is the ownership and user of Glen Ridge Avenue solely as a private street (R. 331).

The said Division 2 found that the constitutional question which was raised by petitioner was, "That no person shall be deprived of property without due process of law." Mo. Const., Art. I, Sec. 10; U. S. Const., 14th Amendment (R. 332).

The said Divisional Opinion cites a number of cases, both Missouri cases and decisions of this Court, to sustain its holding that the petitioner is the owner of the fee of the private street, subject to the exclusive right of user in the lot owners. That its appropriation and conversion by respondents to an unauthorized use is the appropriation of a corporeal hereditament and the damage is direct and within the constitutional inhibitions, citing United States v. Welch, 217 U. S. 333, 339, 30 S. Ct. 527, 54 L. Ed. 787, 28 L. R. A. (New Series) 385 (R. 334), and Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (R. 335).

The said Divisional Opinion further specifically held that the transcript of the record disclosed the appropriation of private property and its conversion to an unauthorized user, i. e., respondents' unauthorized sufferance of the user of a private street by the general public, saying: "A case close in point is Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321" (R. 335). The said Divisional Opinion, quoting from the Pennsylvania Coal Company case, said:

"* * * The natural tendency of human nature is to extend the qualification more and more until at last private property disappears (R. 336). But that cannot be accomplished in this way under the constitution of the United States * * * We are in danger of forgetting that a strong public desire to improve

the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 (R. 336).

The Divisional Opinion remanded the case so that the trial court could continue the same for a reasonable time to afford an opportunity for the lawful acquisition of the private street for public user without the interruption of such user if there be a genuine demand therefor, and the Court was instructed to sustain petitioner's prayer for injunctive relief and to conform with the opinion in other respects (R. 336).

Upon Motion to Transfer the cause to the Court en banc, the case was reargued before the court en banc. Thereafter, the Court en banc rendered an opinion setting out that the first point made by Petitioner was that "in violating the restrictions and covenants—respondents unlawfully appropriated property belonging to petitioner" (R. 341). Then the court holds that this raised a question of fact as to whether such covenants and restrictions were violated and states that "we will discuss later" (R. 342). Then the En Banc Opinion states that the second point made by petitioner is that each lot owner is vested with "A property right, an easement in and to each and every lot" (R. 342). The Court then held that it agreed with the principle that each owner has a property right in all the private streets (R. 342). The En Banc Opinion then discusses the third point raised by petitioner, that "An easement is a property right which can only be taken for public purposes by condemnation . . . after payment of just compensation" (R. 342).

The En Banc Opinion further states that it "is unnecessary to review the cases cited by appellant (petitioner

here) in support of her points"; that the Court agreed with the statements of law which the cases contained as applied to the facts in the cases (R. 342).

Then the decision En Banc states that in February, 1943, the petitioner caused to be served on respondents a paper which, after reciting general charges that respondents had failed to comply with the terms of the indenture, made specific demand that respondents "(1) take immediate and effective steps to close said streets to the public generally thus maintaining their status as private streets, as suggested by the Court of Appeals in said decision" [237 Mo. App. 167, 164 S. W. (2d) 935] and (2) That they immediately retract and recall the easement given to the city to install the signal system. The En Banc Opinion further holds that it may be that the lot owners, by a majority vote, can permanently exclude the public from Glen Ridge. "However, since they have for nineteen years permitted the maintenance of a public school on Glen Ridge, serving more than four hundred pupils from within and without the addition, there may be a doubt that even a majority of the lot owners can exclude the public from the entire street. Be that as it may, a majority of the lot owners have never evidenced a desire to permanently exclude the public from Glen Ridge; nor have they clothed their agents with that power, or vested appellant or any single lot owner with authority to compel the agents to take such action. If appellant can force the closing of Glen Ridge, others can force the closing of the other streets" (R. 343).

The Court en banc in its Opinion further held that the respondents had power, which they had been exercising, to close the private streets, alternately, for short periods to all traffic, but that the Court failed to see how they could successfully discriminate between those who have and

those who have not the right to use the streets when they are open (R. 343).

The Opinion of the Court en Banc observes that the trial court held void the instrument executed by respondents purporting to grant a perpetual easement to the city to maintain a traffic pad on the surface and wires under the surface of Glen Ridge, and says: "We think respondents were without authority to grant a perpetual easement, but are authorized to maintain some such system themselves or to permit the city to do so as long as the street is open to traffic (R. 344).

The Court in its Opinion en Banc then points out that Clayton Road is one of the most traveled highways in Missouri, that it is convenient to get from Glen Ridge into Clayton Road.

The Court answers the constitutional questions raised by the appellant (petitioner here), to-wit, that the actions of respondents have appropriated her property (easement in the street) to public purposes without payment of compensation "has been largely answered by a recital of the facts" (R. 344). The opinion continues, "The fee in all the streets in the addition is owned by all the lot owners as tenants in common (R. 345). In addition to her undivided interest in the fee, appellant as an abutting owner has an easement (right of access) in Glen Ridge so long as it is used for street purposes. But the primary purpose of streets, either public or private, is to afford passage and an abutting owner has no constitutional right to unreasonably obstruct passage by parking vehicles in the street" (R. 345).

The En Banc Opinion then states, "Appellant's contention that her easement of access has been appropriated or destroyed is based upon the fact that she must drive upon

a painted traffic line to get in or out of her driveway. We know of no law or ordinance forbidding her to do so" (R. 345).

There is nothing whatever in the record that bears out or justifies this conclusion on the part of the Court en Banc.

The Court further holds that no legal right of appellant (petitioner here) has been violated (R. 345).

II.

QUESTIONS PRESENTED.

The principal questions presented are:

1. Can a private street, in a private subdivision, be appropriated for public use, without just compensation and absent dedication, because (in the language of respondents) "the requirements of the many must prevail over the isolated demands of the few"? (Resp. Answer, R. 25).
2. Does the existence of a traffic convenience or traffic requirement justify the appropriation of a private owner's easement, in a private street, without condemnation and just payment, where there has been no dedication to the public of such street?
3. Does the Police Power of a municipality extend so far that the owner of a private street, in a Private Subdivision, can be forced against his will to permit its use as a public highway to facilitate traffic (absent dedication and absent the exercise of eminent domain)?

III.

REASONS FOR GRANTING THE WRIT.

1. The constitutional questions involved here are of great importance. They do not merely reflect a legal situation in a certain municipality, but present a situation that is common throughout the United States, and which questions may and do arise in various areas throughout the country.

2. If the holding of the Supreme Court of Missouri en banc be the law, any municipality or any country in the United States can acquire private property ex necessitate without the payment of just compensation, in the very teeth of the Fourteenth Amendment to the Constitution of the United States providing:

“ * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

3. The decision en banc violates the rule of law announced by this Court in the following cases:

United States v. Welch, 217 U. S. 333, 339, 30 S. Ct. 527, 54 L. Ed. 787, 28 L. R. A. (New Series) 385; Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321; Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; Eubanks v. Richmond, 226 U. S. 137.

4. The en banc opinion is untenable and is in conflict with all other decisions so far as we have been able to find,

including numerous decisions of the Supreme Court of Missouri, some of which are cited in the Divisional Opinion.

5. The en banc opinion announces a doctrine fraught with danger not only in connection with covenants in indentures, but with the very security of the home. It violates the Federal Constitution, which guarantees the protection of property of any person against abuses, and blazes the trail for the appropriation of private property by the public without payment and without due process of law.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri commanding that Court to certify and to send to this Court a full and complete transcript of the Record and all proceedings in the case numbered 39955 entitled on its docket Alanda Nemours, Appellant, v. J. F. Hickey, T. J. Hargadon and Gus M. Biston, Individually and as Agents of Moorlands Addition, Respondents, to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States; that the said judgment and decision of the said Supreme Court of Missouri may be reversed by this Honorable Court Court and for such other and further relief as to this Honorable Court may seem meet and just.

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BRIEF

In Support of Petition for Writ of Certiorari.

I.

OPINION.

The opinion of the Supreme Court of Missouri en banc was handed down March 8, 1948. It is reported in 210 S. W. 2nd, p. 94, Nemours v. Hickey et al. The motion for rehearing was filed on March 20, 1948. The motion for rehearing was overruled on April 12, 1948.

II.

JURISDICTION.

(1) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code, amended February 13, 1925, Chap. 229, § 1, 43 Stat. 937, 28 U. S. C. A. 344.

(2) The date of the judgment to be reviewed is March 8, 1948 (R. 338). The motion for rehearing was overruled April 12, 1948 (R. 346).

(3) The facts showing jurisdiction have heretofore been set out in the petition under the heading, "Statement of Matter Involved," and under the "Questions Presented."

(4) The following cases sustain the jurisdiction of this Court to review the decision of the Supreme Court of Missouri en banc on the questions involved:

United States v. Welch, 217 U. S. 333, 339, 30 S. Ct. 527, 54 L. Ed. 787, 28 L. R. A. (New Series) 385;

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413,
43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321;
Panhandle Eastern Pipe Line Co. v. State Highway
Commission, 294 U. S. 613, 55 S. Ct. 563, 79
L. Ed. 1090;
Eubanks v. Richmond, 226 U. S. 137.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition for certiorari under the heading, "Statement of Matter Involved," which in the interest of brevity is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

The Supreme Court of Missouri en banc erred:

1. In holding that all "the 'owners' of Glen Ridge and all the other streets in the addition are all the lot owners" and are necessary to uphold and maintain the restrictions and covenants in question (R. 342). This would deprive an individual lot owner of his property, unless he could get the consent (R. 343) of all the other lot owners.
2. In holding that the constitutional question raised by appellant, namely, that the actions of respondents have appropriated her property (easement in the street) to public purposes without payment of compensation, "has been largely answered by a recital of the facts" (R. 344), since the so-called "recital of the facts" in no way answers the constitutional requirement of Section 1 of the Fourteenth Amendment to the Constitution of the United States, heretofore quoted.
4. In ruling that no "legal right of appellant has been violated," and in failing and refusing to follow and recognize Section 1 of the Fourteenth Amendment to the Constitution of the United States and the decisions of the United States Supreme Court construing the said Constitutional Amendment.
5. In failing and refusing to reverse the judgment with instructions to enter a judgment for the Appellant (petitioner herein) for the relief prayed.
6. In failing and refusing to recognize the ruling of the United States Supreme Court as well as the Missouri appellate courts, to the effect that the closing of Glen Ridge Drive was a condition precedent to restoring its private character, and in refusing to order the restoration of the private character of the street.

V.

SUMMARY OF ARGUMENT.

I.

An easement in a private street is private property which cannot be taken for public purposes except in accordance with law and upon payment of just compensation.

II.

The Supreme Court of Missouri en banc has erroneously followed the theory set out in the respondents' Answer, namely, that "the requirements of the many must prevail over the isolated demands of the individual and the few."

ARGUMENT.

I.

The crux of this case is set out in the Answer of the defendants (R. 27) wherein the defendants plead "the requirements of the many must prevail over the isolated demands of the few." This view was adopted by the Supreme Court of Missouri en banc in its decision. We believe the principle is violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The original Trust Indenture, upon which the rights of all the property owners are based, contemplated that such a situation might arise and guarded against the same by providing an easement for the benefit of each of the resident lots, located in the tract of land, and by providing for free access to the streets and sidewalks, and the right to frequent, use and enjoy the same on the part of the lot owners (R. 45).

The trustees originally had the power to convey the streets and the sidewalks to the City of Clayton for public use as streets, provided the trustees obtained the consent of the owners of three-fourths ($\frac{3}{4}$) of the number of front feet in said tracts. This concededly was never done.

Upon the decease of the last survivor of the trustees, under Paragraph 22 of the Indenture (R. 55), the easements, conditions, restrictions and covenants remained in full force and were applicable to and binding upon the private streets and sidewalks, and upon every owner and occupant, but only as **easements**, conditions, restrictions and charges and not as trusts (R. 58).

The general object and intents of the trust were to continue, and the owners were given the right to adopt such reasonable rules and regulations as they might think proper affecting the private streets and sidewalks, providing such rules and regulations should be consistent with the easement and the right to frequent, use and enjoy the streets and sidewalks, as provided in the Indenture Deed (R. 45). Thus, the power and authority to make reasonable rules and regulations is limited to the owners of the lots.

After January 1962, under Paragraph 25 (R. 58) a majority of the lot owners have the right to abolish all or any of the restrictions, conditions, covenants or reservations upon complying with the provisions of the said Section 25. So that the restrictions, covenants, conditions and reservations cannot now be changed prior to January 1962. The lot owners were further protected by a provision in the Trust Indenture (R. 53), to the effect, that, in the event of any infringement of the covenants and provisions, it should be lawful for any other person or persons as owners, to prosecute any proceeding in law or equity against the person infringing or attempting to infringe, or omitting to perform such covenants, or to prevent such person or persons from violating such provisions or covenants or to recover damages for such violation of the same (R. 54).

Petitioner bought her property upon the strength of the restrictions, covenants and conditions of the original Trust Indenture, and assumed and had the right to assume that she was living on a private residential street, protected by such restrictions, covenants and conditions.

II.

The law is well settled that in violating the restrictions imposed on lots, the respondents unlawfully appropriated property belonging to your petitioner.

Britton v. School District etc., 328 Mo. 1184, 44 S. W. 2d 33.

In Peters v. Buckner, 288 Mo. 618, 232 S. W. 1024, 1027, the Missouri Supreme Court en banc held that covenants and agreements in a deed, like the one in the case at bar, give the owners of lots, and creates and vests each of them, as owners, a valuable right of property, an easement in and to each and every lot, which is an appurtenance to their respective lots, and held, that such rights are property rights under the Constitution of the United States and can not be taken or damaged without just compensation.

The fact that the petitioner in this case is the only one whose property is affected by the acts complained of does not and can not change this rule of law or affect her constitutional right. If this petitioner attempted to do, anywhere in the Moorlands Addition, what the respondents have done, any lot owner could stop her by injunction or otherwise. If the lot owners themselves can not violate the terms of the Indenture Deed, *a fortiori*, the Agents, with authority limited to sue for and collect assessments, can not violate the terms of the said Indenture, and certainly they have no right to take petitioner's property under the guise of "reasonable rules and regulations."

Upon the death of the original trustees title to the private streets vested in the owners of the lots as tenants in common (R. 59) as contradistinguished from that of joint tenants.

As a matter of fact the lot owners themselves can not authorize the agents to violate the terms, provisions, restrictions and covenants of the Trust Indenture.

If the ruling of the Supreme Court of Missouri en banc is the law of the land then minority lot owners are helpless in spite of the fact that the Trust Indenture itself gives them the right to take legal action to maintain the covenants, provisions, restrictions and easements set out in the Indenture, and authorizes them to take any necessary legal steps to enforce the same.

The Supreme Court of Missouri en banc, after reciting facts to show there has been a taking, fails to cite a single case which authorizes such a taking without just compensation. It amounts to an indecision on the main point in this case, particularly in view of the fact that the Court fails to trace the rights of each and every lot owner back to the original indenture, which sets out the covenants, provisions, restrictions and reservations which shall be binding on all. The opinion of the court announces a rule of law, and by its opinion en banc enforces the same, which abridges petitioner's privileges as a citizen of the United States in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and violates the Due Process Clause of the same section.

The en banc decision incorrectly states that appellant's (petitioner here) contention that her "easement of access" has been appropriated or destroyed, is based upon the fact that she must drive upon a painted line to get in and out of her driveway (R. 345). Petitioner made no such contention at any time during the entire proceedings.

Her contention is:

- (a) That Glenridge Avenue is a private street, towards the maintenance of which she contributes;

- (b) That said private street has never been dedicated for public use, acquired by prescription, nor condemned for public use;
- (c) The Indenture of December 11, 1922, sets out the covenants, restrictions, easements, etc., and the owners acquired their property rights through this Indenture;
- (d) An easement in real estate is property within the meaning of the constitutional provisions;
- (e) Plaintiff is the owner of the fee of the private street, subject to the exclusive right of user in the lot owners;
- (f) Neither the public nor the individual respondents can convert the property to public use without the payment of just compensation;
- (g) Under the provisions of the Trust Indenture any lot owner may enjoin any person, including the agents, from violating the terms, provisions, covenants and conditions of the Indenture, since the same run with the land by the express terms of the said Indenture;
- (h) The Court en banc has erroneously followed the theory set out in the respondents' original answer, namely, that "the requirements of the many must prevail over the isolated demands of the individual or the few";
- (i) The Court has overlooked the fact that Glenridge Avenue, as well as the other streets within the Addition, are private streets exclusively for appellant and the other residents and their proper families and owned by appellant and the other lot owners in the Addition.

It is not a question of how many or how few desire to have the covenants, restrictions and conditions of the Trust Indenture preserved and enforced. A single lot owner has a perfect right to insist upon the enforcement

of the terms of the Trust Indenture in its entirety. The Missouri Supreme Court has held that as long as Glen Ridge Avenue is permitted to remain open to the public that the City of Clayton has a right to regulate the traffic. But in this case, petitioner protested from the very inception of the taking, and she is seeking to have the private character of the private street restored, because Glen Ridge Avenue was made a public street without authority and in violation of petitioner's constitutional rights, resulting in a deprivation of her property without Due Process of law.

CONCLUSION.

If the opinion of the Supreme Court of Missouri en Banc is permitted to stand it marks a new era in the encroachment upon the said constitutional clause that private property can not be taken for public use, except upon payment of just compensation and according to law. It will seriously impair the effect and validity of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The situation presented herein is one common to many communities throughout the United States. The effect of the said en banc decision is far-reaching, as above pointed out.

Petitioner built a beautiful and expensive home in what she believed to be a private and exclusive Subdivision, protected by an original Indenture of Trust, containing certain terms and conditions under which that subdivision would be controlled and operated, and all of which were of public record when she did so. She thereby acquired property rights, not only in the private subdivision and the easements adjoining her home, but also in the said private street. The en banc decision in violation of her constitutional rights destroys these rights.

We earnestly urge this Honorable Court to grant the petition for certiorari in order that the matter may be fully presented before this Court for its consideration.

Respectfully submitted,

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